



No. 83-1211

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1983

Teamsters Local Union No. 36,
Building Material and Dump
Truck Drivers,

Petitioners,

vs.

Lee O. Edwards, Jr.,

Respondent.

PETITIONER'S REPLY TO RESPONSE
IN OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
Table of Contents	i
Index to Appendices	ii
Table of Authorities	iii
Introduction	1
Argument	2

I.

The Ninth Circuit Stands Alone in its Refusal to Apply Del- Costello Retroactively	2
--	---

II.

At the Time Edwards Filed His Suit, The Ninth Circuit Applied Mitchell to Both the Employer and the Union	5
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III.

The Edwards Decision Continues to Have a Profound Impact Within the Ninth Circuit	9
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IV.

Conclusion	10
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INDEX TO APPENDICES

	<u>Page</u>
Appendix i. Cases Within the Ninth Circuit Affected by the Edwards Decision	1

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Chevron Oil v. Huson, 404 US 97(1971).....	3
DelCostello v. Teamsters, <u>US</u> 103 S.Ct.2281(1983).....	2,3,4,5, 7,8
Lincoln v. Machinists' District 9, 723 F2d 627(8th Cir.1983).....	3
McNaughton v. Dillingham Corp., 707 F2d 1042(9th Cir.1983).....	6
Murray v. Branch Motor Express Co., F2d (4th Cir.1983) 115 LRRM 2183.....	3
Price v. Southern Pacific Trans- portation Company, 586 F2d 750(9th Cir.1978).....	5
Singer v. Flying Tiger Lines, Inc., 652 F2d 1349(1981).....	5,6,7,8
United Parcel Service, Inc. v. Mitchell, 451 US 56(1981).....	5,6,8
Williams v. United Airlines, et al, 553 F.Supp.863(N.D. Ca.1982)...	6

STATUTES

Labor-Management Relations Act, 29 USC 160(b).....	7
29 USC 185.....	6,8

TABLE OF AUTHORITIES -- Continued

<u>OTHER</u>	<u>Page</u>
California Code of Civil Procedure, §338 (1) (West's 1982).....	5
§1288 (West's 1982).....	6

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INTRODUCTION

A Petition for a Writ of Certiorari submitted by Teamsters Local Union No. 36, Building Material and Dump Truck Drivers, hereafter "Union", was docketed in this Honorable Court on January 23, 1984. Thereafter, Respondent Lee O. Edwards, Jr. timely filed a response in opposition to said Petition. The Union presently replies.

Given the required brevity of a Reply, the Union's discussion set forth below will necessarily be limited in scope. However, this is not to be construed as an acknowledgment by the Union that Edwards' Response, or any part thereof, has merit. To the contrary, the Union believes that Edwards' Opposition Brief fails to rebut the arguments set forth in the Union's Petition and therefore Certiorari should issue to review the decision below.

ARGUMENT

I

THE NINTH CIRCUIT STANDS ALONE
IN ITS REFUSAL TO APPLY DEL-
COSTELLO RETROACTIVELY

In its Petition, the Union discussed the express conflict among the circuits as to whether DelCostello should be applied retroactively. UP 20-23¹ Since filing its Petition, the Union has learned of two other circuits which have ruled on the issue as to whether DelCostello should be applied retroactively. Both circuits answered in the affirmative.

The Fourth Circuit applied DelCostello retroactively to a complaint filed twenty-nine months after the issuance of the adverse arbitration award dated

¹"UP" refers to Union's Petition for Writ of Certiorari.

"EO" refers to Edward's Response in Opposition to Petition for Writ of Certiorari.

April 22, 1976. Murray v. Branch Motor Express Company, __F2d__ (4th Cir.1983); 115 LRRM 2183.

The Eighth Circuit, after explicitly reviewing the factors in Chevron Oil v. Huson, 404 US 97(1971) and further noting that it "appears that the Supreme Court applied the DelCostello decision retroactively to DelCostello and to Flowers", held that DelCostello should be retroactively applied to an employee whose claim arose in January 1981 but failed to file suit until nearly a year later. Lincoln v. Machinists' District 9, 723 F2d 627(8th Cir.1983), 630.

To date, eight circuits have dealt with the issue as to whether DelCostello should be applied retroactively.

Seven circuits have answered in the affirmative.² The Ninth Circuit stands alone in its refusal to apply DelCostello retroactively. The Ninth Circuit's position is in conflict with the vast majority of the Circuits.

²For decisions of other circuits, see UP 20-22.

II

AT THE TIME EDWARDS FILED
HIS SUIT, THE NINTH CIRCUIT
APPLIED MITCHELL TO BOTH THE
EMPLOYER AND THE UNION

Citing Price v. Southern Pacific Transportation Company, 586 F2d 750 (9th Cir. 1978), Edwards contends that "with a duty of fair representation issue, the applicable pre-DelCostello statute of limitations in California was California Civil Procedure Section 338(1)", a three year statute. EO 11-12. This is a misstatement of Ninth Circuit law as applied in California.

On August 13, 1981, the Ninth Circuit held that it would prospectively apply Mitchell to both the employer and the union. Singer v. Flying Tiger Line, Inc., 652 F2d 1349(1981). See also: UP 16, footnote 9. Singer was viable

caselaw until it was reversed by the Ninth Circuit in McNaughton v. Dillingham Corp., 707 F2d 1042(9th Cir.1983). According to McNaughton, the Singer ruling was based on the "erroneous assumption" that the union as well as the employer was a petitioner in Mitchell. Id. 1047, footnote 6. Thus, in the period between the Singer decision and the McNaughton decision Singer was the law of the Ninth Circuit. Pursuant to Singer, the applicable California statute of limitations was California Code of Civil Procedure Section 1288, a one-hundred day limitations period within which to file an action to vacate an arbitration award. See: Williams v. United Airlines, et al, 553 F.Supp. 863(N.D. Ca. 1982), pursuant to Singer, plaintiff's hybrid Section 301 action held untimely under California Code of Civil Procedure Section 1288.

The assertion in Edwards' opposition

brief that prior to DelCostello the applicable California statute of limitations in a duty of fair representation suit was three years, allows Edwards to further argue that in the present matter the Ninth Circuit correctly refused to apply DelCostello retroactively so as to avoid a sudden shift from a three year limitations period to the much shorter six month limitations period under 10(b) of the Labor-Management Relations Act. EO 14-32.

However, as discussed above, pursuant to Singer, the applicable California statute of limitations in reference to a duty of fair representation claim was 100 days. Thus, contrary to Edwards' assertion, retroactive application of DelCostello would significantly lengthen rather than shorten the time in which plaintiff could file his claim.

Mitchell was decided in April 1981. Singer was decided in August 1981. Despite these two decisions, Edwards did not file suit until December, 1981, nearly ten months after his grievance arose and four months after the Singer decision.

In conclusion, Singer was the applicable law at the time Edwards filed suit. In accordance with Singer, the 100 day California statute for vacating an arbitration award was the limitations period in which a plaintiff could timely file a hybrid Section 301 suit. Retroactive application of DelCostello would have expanded, not truncated, the limitations period to six months.

III

THE EDWARDS DECISION
CONTINUES TO HAVE A
PROFOUND IMPACT WITHIN
THE NINTH CIRCUIT

In its Petition, the Union listed numerous cases in which the Ninth Circuit's decision in the present matter would be felt. UP 42-45. Since the filing of its Petition, the Union has learned of yet more cases which would be affected by the Ninth Circuit's decision in Edwards. See: Appendix i.

CONCLUSION

For the reasons set forth above and in the Union's Petition, the Union respectfully requests that Certiorari issue to review the decision below.

Respectfully submitted,

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A P P E N D I C E S

APPENDIX i

(1) Cases pending before the

Ninth Circuit:

Daunais v. Teamsters Local No.
2707 and Western Airlines,
83-4039

Felden v. Hamilton, et al,
83-4224

Glover, et al v. United Grocers,
Inc., et al,
83-4202

Hass v. Darigold Dairy Prod. Co.
and Teamsters Local Union No.
66, et al.,
No. 83-4231

Wilhite v. Greyhound Lines, et al,
83-4212

(2) Cases pending before the

District Courts within the Ninth Circuit:

Cunningham v. United Steelworkers
of America Local 329,
C82-546-RJM E.D. Wash.